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IN THE

Supreme Court of the United States

October Term, 1955

No.

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, National Lead Company, respondent below, prays that a writ of *certiorari* issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (App. A, pp. 1a-4a, *infra*) are reported at 23 T.C. 988, 1002. The opinion of the Court of Appeals for the Second Circuit (App. B, pp. 4a-10a, *infra*) is reported at 230 F. 2d 161.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, reversing the Tax Court, was entered February 14, 1956. The taxpayer's timely petition for rehearing, filed on February 29, 1956, was denied by Order entered March 12, 1956. The jurisdiction of this Court is invoked under ~~Tit.~~ 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the War Production Board, in issuing a certificate of necessity under Section 124 of the Internal Revenue Code of 1939, could, because the facility certified was likely to have post-war use, validly limit the effectiveness of such certificate to only that part of the cost of the facility certified, as was considered to represent the excess of the war-time cost over the peace-time cost of the facility.

2. Whether the validity of such a percentage of cost limitation attached by the War Production Board can be determined in a proceeding involving tax liability and overpayment.

3. Whether the Court of Appeals for the Second Circuit erred in disregarding findings of fact by the Tax Court supported by the evidence, and substituting its own findings.

4. Whether the Court of Appeals for the Second Circuit erred in passing upon an issue not raised in the Tax Court by the pleadings or otherwise, and which was not considered or passed upon by the Tax Court.

5. Whether, on its theory of the case, the Court of Appeals for the Second Circuit erred in failing to remand the case to the Tax Court for further proceedings.

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved are Sections 23(t) and 124 of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in App. C, pp. 10a-14a, *infra*.

STATEMENT

In the proceedings before the Tax Court, the facts were fully stipulated by the parties. The stipulated facts were adopted by the Tax Court as its findings of fact, 23 T.C. 988, 989; App. A, p. 1a, *infra*. The facts, as so stipulated and found, may be summarized as follows:

During World War II the petitioner (the "taxpayer") was engaged in the manufacture of engine bearings. Requiring additional facilities for such purpose, the taxpayer applied to the War Production Board (the "Board") for certificates under Section 124 that the facilities were "necessary in the interest of national defense during the emergency period". Such certificates would permit the taxpayer in computing taxable income to elect to take amortization deductions spread over a five-year period, rather than the ordinary depreciation deductions spread over the normal useful lives of the facilities.

The Board issued four certificates in respect of the facilities. The Board, however, had adopted a policy designed to limit amortization to estimated excess war costs in the case of facilities having possible post-war utility. Pursuant to that policy, the certificates were framed as follows (R. 5, 6):

> It is hereby certified that the facilities * * * are necessary in the interest of national defense dur-

> ing the emergency period, up to 35 per cent of the cost attributable to the construction * * * or acquisition thereof * * *.

In one instance, the percentage was 50 per cent.

When the taxpayer filed its tax returns, it elected to take the amortization deductions. In computing its amortization deductions, the taxpayer gave effect to the percentage of cost limitations contained in the certificates.

Subsequently, the Commissioner asserted deficiencies against the taxpayer on grounds unrelated to the amortization issue here presented, whereupon the taxpayer duly filed its petition to the Tax Court. By amended petition, timely filed, the taxpayer claimed overpayment in that it had taken amortization deductions only to the percentages of the costs of the certified facilities that were specified in the certificates, whereas it should be allowed amortization deductions based upon their full costs.

The Tax Court, one judge dissenting, sustained the taxpayer's contention, expressing agreement with the majority views of the Court of Claims in *Wickes Corp.* v. *U.S.*, 108 F. Supp. 616, which that Court has since reiterated in *Ohio Power Co.* v. *U.S.*, 129 F. Supp. 215, and *Allen-Bradley Co.* v. *U.S.*, April 3, 1956, not yet reported, App. D, pp. 14a-15a, *infra*, and with the dissenting opinion of Judge Miller of the Court of Appeals for the District of Columbia in *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868. The Court of Appeals for the Second Circuit reversed.

The controversy is of the same cloth as that currently before this Court upon the Government's petition for a writ of *certiorari* to the Court of Claims in *United*

States v. *The Allen-Bradley Co.*, No. 923, and recently in *U. S.* v. *Ohio Power Co.*, No. 312, in which the Government made three unsuccessful efforts for *certiorari*, 350 U.S. 862, 919 and ——, May 28, 1956. The controversy stems from World War II legislation enacted to encourage industrial expansion needed in the war effort by permitting accelerated amortization deductions, for tax purposes, with respect to new and expanded facilities certified as necessary to the national defense. In the period here pertinent the Board was the certifying agency. The Board took the position that where a proposed facility, necessary to the national defense, was likely to have post-war utility, accelerated amortization should be limited to the excess cost of war-time construction or acquisition, and pursued a policy in such cases of issuing certificates for less than 100 per cent of cost. The ultimate questions common to this, the *Ohio Power* and the *Allen-Bradley* case, are whether the War Production Board's action in so limiting its certificates was within its authority and, if not, whether a holder of a certificate for less than 100 per cent of cost is entitled to amortize the full cost of the property during the accelerated statutory period.

While the Court below said that it did not reach the first of these questions, it in fact proceeded, 230 F. 2d at 164, App. B, pp. 8a, 9a, *infra*, to analyze the statute and to reach the conclusion that the Board had discretion under the statute to issue certificates with respect to less than 100 per cent of cost. The Court expressed disagreement with the reasoning in *Wickes* and interpreted the certificates as certifying the facilities as being only partially necessary to the national defense —i.e., only to the extent of the specified percentages of their costs—thus completely ignoring the finding of

the Tax Court, adopting the stipulation of fact between the parties which the Commissioner summarized in his main brief below, p. 4, as follows:

> All these partial certificates were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use.[1]

The Court below answered the second question by holding that the Board's authority to issue a limited certificate could not be challenged in this proceeding, and that the taxpayer's only remedy was mandamus against the Board. For the proposition that such relief was available, the Court cited *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub. nom., United States Graphite Company* v. *Sawyer*, 176 F. 2d 868, *cert. den.*, 339 U.S. 904. The Court below held that by its failure to pursue such remedy at the time of the issuance of the certificates and by its "acceptance" thereof, the taxpayer had "forfeited" its right to challenge the Board's action. 230 F. 2d at 165, App. B, p. 9a, *infra*.

Whether the authority of the Board to issue a limited certificate could be challenged in this proceeding was

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[1] In its main brief below (p. 1) the taxpayer stated that it took "no issue" with the Commissioner's statement of the case. It is thus without warrant that it was asserted in the brief of The Ohio Power Company submitted in opposition to the Government's motion in *United States* v. *The Ohio Power Company*, No. 312, p. 17, that "[t]he record in *National Lead* fails to show what the percentages in those certificates represented"; i.e., excess capacity over that necessary to national defense or notwithstanding that the whole of the facility was found necessary to national defense, excess of wartime cost over peace-time cost where post-war use was reasonably anticipated. *Id.* pp. 15, 16. See Gov't Rep. Br. in No. 312, p. 3.

not raised by the Commissioner in his answer or otherwise in the Tax Court notwithstanding the provision of Rule 14 of the Tax Court's Rules of Practice that

> The answer shall be so drawn as fully and completely to advise the petitioner and the Court of the nature of the defense.

It was raised for the first time in the Commissioner's main brief, pp. 41-47, in the Court of Appeals. Upon its petition for rehearing in the Court below, the taxpayer urged that if the Court should adhere to its decision to reverse, it should nevertheless remand the case to the Tax Court, to afford the taxpayer an opportunity to improve the record on this score, if it could. *Hormel* v. *Helvering*, 312 U.S. 552. The Court below declined to do so.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court below is in direct conflict with decisions of the Court of Claims.* The decision below is in direct conflict with the *Wickes*, *Ohio Power*, and *Allen-Bradley* cases decided in the Court of Claims. In *Allen-Bradley*, that Court expressly recognized the decision of the Court below as being "contrary" to its own decisions, and refused to follow it. App. D, p. 14a, *infra*.

While it might be suggested that a distinction is to be found in that *Wickes* and *Ohio Power* were grounded squarely on a construction of the statute, while here the Court purported to base its decision on some form of estoppel, waiver, or collateral attack, any such distinction is patently illusory. For, the question whether the authority of the Board to

issue limited certificates could be challenged in a tax proceeding was necessarily decided by the Court of Claims in the affirmative *sub silentio,* if such issue was involved in the litigations before it notwithstanding its not having been raised in pleadings, briefs, or arguments. Conversely, if, by reason of the failure of the Commissioner to raise any such issue in the Tax Court, the issue was not properly before the Court below, then, too, any such distinction evanesces. But whatever the niceties, if there be any, it is not meet that the result under a statute of the United States should differ in identical circumstances and should depend, yea or nay, upon the court before which the question happens to arise. In *Allen-Bradley,* however, the decision of the Court below was expressly rejected by the Court of Claims. In the Government's pending petition in *Allen-Bradley,* No. 923, (pp. 10, 11) it is stated that according to the Internal Revenue Service "there are at least 39 pending cases involving the same problem" with a total of approximately $62,000,000 at stake in all cases.

2. *Section 124 did not authorize the limitation of amortizable cost to the excess war cost of certified facilities having likely post-war use.* Section 124 conferred no such authority, certainly not expressly and plainly not by implication; and its legislative history is clear that none was intended. For these propositions reliance is put squarely on Judge Miller's dissent in *Graphite,* 176 F. 2d 868, 870, 871, and on the majority opinion in *Wickes,* 108 F. Supp. 616, 619, 620. To what is said there, we need only add the following further references to the legislative history.

In addition to the testimony quoted by Judge Miller, Assistant Secretary of the Treasury Sullivan testified

(Hearings, Senate Committee on Finance, Second Revenue Act of 1940, 76th Cong., 3d Sess., pp. 125, 127):

> Under this law, it may be prudent, it may be the wise thing to do; but I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is "reasonable," and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture.
>
> * * *
>
> We don't know that that [i.e., a five-year period or less] is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after the war is over, or the present emergency is over, or the particular contract they are built to perform is over, as they are during the time that contract is being performed.
>
> * * *
>
> SENATOR GEORGE. We take it to be your judgment on that question that these added facilities are going to become either what we now call for lack of better term, in "obsolescence" or that the depreciation is going to absorb all the value within the statutory period that follows the issuance of this certificate.
>
> MR. SULLIVAN. Excuse me, Senator George, that is not our judgment. We don't know that they are. We are saying that regardless of whether or not they do, it is prudent and wise to confer this special privilege of assuming that they are going to—

SENATOR GEORGE (interposing). But we are writing it in the law?

MR. SULLIVAN. That is right.

William S. Knudsen, a member of the Advisory Commission to the Council of National Defense, testified in a similar vein (*id.*, 159):

> If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes.

When the bill was being debated on the floor of the House, Representative Boehne, a member of the Ways and Means Committee and of its subcommittee on Internal Revenue Taxation, made the following statement (Cong. Rec., Aug. 29, 1940, p. 11240):

> Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year—
> * * *.

* * *

> In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a 5-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense.

And if the contemporary history is not enough, there is subsequent legislative history of significance. The Korean emergency brought on a new defense production program, and with it new amortization legislation. The new provision, incorporated into the 1939 Code as Section 124A, includes a subsection (e)(1), which, with one outstanding addition, is substantially the same as subsection (f)(1) of Section 124, the provision here involved. The new enactment, with the addition emphasized, follows:

> (e) Determination of Adjusted Basis of Emergency Facility.—In determining, for the purposes of subsection (a) or subsection (g), the adjusted basis of an emergency facility—
>
> (1) There shall be included only so much of the amount of the adjusted basis of such facility (computed without regard to this section) as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1949, as the certifying authority, designated by the President by executive order, has certified as necessary in the interest of national defense during the emergency period, *and only such portion of such amount as such authority has certified as attributable to defense purposes.* * * *

The Senate Committee on Finance said of this change (S. Rept. 2375, 81st Cong., 2d Sess., p. 59):

> The bill provides that a portion of the facility may be designated as essential. *There was no similar provision under the World War II legislation,* but certificates limiting amortization to a percentage of the total cost of a facility were issued in the closing months of the war. (Emphasis supplied.)

3. *The decision of the Court below denies the taxpayer the remedy expressly prescribed by statute and mandamus was not available as a remedy.* The *ratio decidendi* of the Court below rests upon a demonstrably false premise and, if allowed to stand, its decision would inevitably become authority to subvert a principle enunciated by this Court time and time again as being essential to a demarcation between the judicial and executive functions.

Neither Section 124, under the authority of which the certificates of necessity were issued, nor any other legislation makes provision for the judicial or other review of the action of the certifying agency, as such. But in tax controversies with the Commissioner, on whatever basis, under the 1939 Code, as under its predecessors and successor, the taxpayer's statutory remedy is to seek resolution of the question in the Tax Court as provided by the Code or by action for refund in the Court of Claims or a District Court. *Lowe Brothers Co.* v. *United States,* 304 U.S. 302; Tit. 28 U.S.C., Sec. 1346. Upon the Commissioner's assertion of a deficiency the taxpayer followed the procedures and invoked the jurisdiction of the Tax Court prescribed in Sections 272, 732 and 322(d) of the Internal Revenue Code of 1939. The section last cited specifically provides:

> If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

The holding of the Court below, however, is that notwithstanding the clear and all-inclusive language of the statutes, the ordinary remedies are not available to a taxpayer when the controversy has its root in the effect to be given a certificate of necessity issued under Section 124, an integral part of the Internal Revenue Code. Thus, the Court below said, 230 F. 2d at 165, App. B, p. 9a, *infra*.

> The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 * * * aff'd *per curiam, sub nom., United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 * * * cert. denied, 339 U.S. 904, and the remedy was altogether appropriate.[2]

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[2] In the next sentence the Court below added an application for "appropriate injunctive relief" to mandamus as "the" remedy which the taxpayer might have, nay, alone could have pursued. But the principles applicable in the circumstances to injunctive relief are no different from those governing mandamus. Cf. *Adams* v. *Nagle*, 303 U.S. 532, 542; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 322. Accordingly, the two "remedies" prescribed by the Court below may properly be considered as one and the same, and are herein so treated.

But the statutory provisions apply to *all* tax controversies and make no exception for overpayment resulting from a misconstruction of Section 124. And there is a curious inversion inherent in the holding that the availability of the *extraordinary* remedy of mandamus rendered unavailable the *ordinary* remedies prescribed by statute, for mandamus is "usually denied where other adequate remedy is available". *Ex parte Republic of Peru,* 318 U.S. 578, 584; *Ex parte Baldwin,* 291 U.S. 610. Moreover, the Court below was manifestly in error in holding that mandamus was available as a remedy. This Court has repeatedly said, as it did in *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206, 218, 219:

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus * * *. But where the duty is not thus plainly prescribed but depends upon a statute * * * the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

And, while in such a case, as this Court said in *Adams* v. *Nagle,* 303 U.S. 532, 543, the administrative officer's

> errors may be subject to subsequent correction, they cannot be enjoined * * *. *To hold otherwise would render orderly administrative procedure impossible.* (Emphasis supplied.)

Nor in *Graphite* did the District Court (or the Court of Appeals which affirmed *per curiam* on Judge Pines' opinion) misunderstand, as did the Court below, the

limited nature of its jurisdiction on mandamus. For, in *denying* mandamus, Judge Pine said, 71 F. Supp. at 946:

> * * * but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding * * *.
>
> * * * Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. *So far as its exercise involves interpretation of the statute* * * *, *the statement made in the preceding paragraph is equally applicable* * * *. (Emphasis supplied.)

Heading the list of the many cases in this Court and the Court of Appeals for the District of Columbia cited by Judge Pines in support of the foregoing are *Adams* v. *Nagle* and *Wilbur* v. *United States ex rel. Kadrie, supra.* And while Judge Pine and the majority of the Court of Appeals may have agreed with the Board's construction of the statute, it is clear that mandamus would equally have been refused if they had disagreed with the Board's interpretation, provided only they found it reasonable. For, if the law be otherwise elsewhere, the Court of Appeals for the District of Columbia has frequently said, as it did in *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308, 322, one of the many authorities to the same effect cited by Judge Pines:

> The rule is, of course, too well settled to require discussion that mandamus will not issue to interfere with the discretion of an administrative officer in construing a statute *even though the court would construe the statute otherwise, provided the officer's construction is reasonably possible.* (Emphasis supplied.)

Thus, all *Graphite* stands for is that the Board's construction was not necessarily unreasonable so as to permit judicial interference *in limine* by mandamus. But, the refusal of mandamus does not preclude "subsequent correction". *Adams* v. *Nagle, loc. cit. supra.* The Government itself recognized this when, after the decision in *Graphite,* the plaintiff, by then merged into the Wickes Corp. under that name, brought an action in the Court of Claims for tax refund, and made the same contention, with success, that it had made upon its unsuccessful application for mandamus. In the later case the Government, quite properly, did not plead *res adjudicata,* for the only question in *Graphite* was whether the Board's construction was "reasonably possible", while the issue in *Wickes* was whether it was correct. So long as it stands unreversed, the opinion below will lend authority to a heresy which, as this Court has said, "would render orderly administrative procedure impossible". *Adams* v. *Nagle, loc. cit. supra.*[3]

4. *The Court below disregarded an essential finding of fact by the Tax Court, supported by the evidence, and substituted its own.* The Court below said, 230 F. 2d at 164, App. B, pp. 8a, 9a, *infra.*

> * * * The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the

[3] In the case cited, this Court struck down as erroneous the view taken by a "number of Federal courts" on the basis of broad language used in *United States* v. *Knox,* 102 U.S. 425, that the remedy for "clear error of law" on the part of a public officer was by direct attack for mandamus or injunctive relief. See 303 U.S. at 541, 542.

> Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35 per cent or 50 per cent rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.
>
> Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. * * *

But the case was tried to the Tax Court on stipulations of facts between the parties, which the Tax Court adopted in their entirety, 23 T.C. 988, 989, App. A, p. 1a, *infra,* and included among the stipulations was one which set forth "the reasons for the percentage limitations appearing on the face of the" certificates. (Comm'r's. Br. below, p. 5, n. 3). In his main brief to the Court below, the Commissioner summarized this stipulation, and of necessity, the consequent finding of the Tax Court, as follows (pp. 5-6):

> All these partial certifications were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use. In the ordinary case this excess war cost was considered to be 35 per cent.

With this the taxpayer is in agreement, and so stated in its brief below (p. 1).

Thus, the parties stipulated and the Tax Court found, as fact, that the percentage represented not the *extent* to which the Board determined the facility necessary to the war effort, as the Court below presumed to find, but the *estimated excess of war cost over the estimated peace-time cost* of a facility necessary in the national defense, but having post-war utility.

The finding of the Tax Court was supported by the evidence, and as such was conclusive: It was error for the Court below to disregard this finding and to substitute its own. *Dobson* v. *Commissioner,* 320 U.S. 489; *John Kelley Co.* v. *Commissioner,* 326 U.S. 521; *Fuld* v. *Commissioner,* 139 F. 2d 465. "The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact." *Helvering* v. *Rankin,* 295 U.S. 123, 131.

5. *Neither waiver, estoppel nor collateral attack was pleaded, briefed, argued or passed upon in the Tax Court. Accordingly, no such issue should have been considered by the Court of Appeals.* Waiver, estoppel and collateral attack are defenses properly to be pleaded affirmatively. Cf. Rule 8(c) of the Federal Rules of Civil Procedure; *National Nickel Co.* v. *Nevada Nickel Syndicate,* 112 Fed. 44, *cert.* denied 184 U.S. 700; *Hollister* v. *Commissioner,* 44 B.T.A. 851; *Collins* v. *Commissioner,* 18 T.C. 99, aff'd 203 F. 2d 565; *Carnegie Center Co.* v. *Commissioner,* 22 T.C. 1189. This is necessarily so if the answer is "fully and completely to advise the petitioner and the Court of the nature of the defense." Tax Court Rule 14. The Rule of the Tax Court is clear. So are *General Utilities & Op-*

erating Co. v. *Helvering*, 296 U.S. 200, and *Helvering* v. *Salvage*, 297 U.S. 106. In the latter case this Court said, 297 U.S. at 109:

> The defense of estoppel was not before the Board. Under what we regard as the corect practice * * * the court should have passed the point.

6. *The Court below should have at least remanded the case to the Tax Court.* If notwithstanding the stipulation between the parties and the findings of the Tax Court, there remained any question as to what the Board was doing when it issued the limited certificates, or if the question of the Board's authority was necessarily to be litigated in some other forum before a resolution of the instant tax controversy, then, as the taxpayer asked upon petition for rehearing, the Court below should have remanded the case to the Tax Court to afford the taxpayer an opportunity to improve the record, if he could. *Hormel* v. *Helvering*, 312 U.S. 552.

The nature of the Board's action was not in controversy before the Tax Court. It was the subject of stipulation. Any question left open by the stipulation was subject to resolution by the introduction into the record of the relevant files of the Board or by other means. Similarly, if the instant tax controversy could not be resolved absent a judgment in an action between the taxpayer and the Board, the latter's successor, the Secretary of Commerce,[4] is amenable to process, and the taxpayer should have been given an opportunity to correct the record by introducing, if he could, an appropriate judgment.

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[4] Executive Order 9841, 12 F.R. 2645.

While in denying the taxpayer's petition for reargument the Court below rendered no opinion, more than a clue to its reasons for not remanding is apparent from the opinion it did hand down. Thus, the Court below said, 230 F. 2d 165, App. B, p. 9a, *infra*.

> * * * If the petitioner [*sic*] had sought mandamus or appropriate injunctive relief in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. * * *

The Court's observations would seem to present a veritable paradox of omniscience and nescience. The certificates were issued in 1944, some twelve years ago. Many controversies have been determined longer after-the-fact than that. See e.g., *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289; *Hudson* v. *Texas Gulf Sulphur Co.*, 72 F. 2d 251, *cert.* denied, 293 U.S. 617. Indeed, fifteen and twenty year statutes of limitations are not uncommon. Nor is it *necessarily* so that the passage of time dulls the perception of the relevant considerations. On the contrary, it may sharpen them. Thus, for example, who would deny that the tribunal that retried Joan of Arc in 1455, had a better percep-

tion of the relevant considerations than the court that tried and condemned her in 1431?

In any event, the Court below could not know whether it is "now impossible for any court or administrative agency or official to make a proper determination * * * based on considerations relevant in 1944". In fact, the considerations that were relevant in 1944 are not difficult to ascertain, and for anything that may not be spelled out in contemporary official documents, which are presumably available, there could be no dearth of qualified witnesses to whom 1944 would be but as yesterday. However that may be, the burden of proof would be on the taxpayer. And the taxpayer was entitled to an *opportunity* to improve the record if it could. *Hormel* v. *Helvering,* 312 U.S. 552.

The further reason of the Court below, that by its "acceptance" of the certificates, the taxpayer "forfeited" its right to litigate the question, lends credence to the thought that the view of the Court below as to the impossibility of now applying considerations that were relevant in 1944, may stem from its own failure to remember 1944.

The first certificate was issued in February, 1944. The landings at Anzio and on the Kwajalein Atoll had just been made in January. The battle for Cassino was still raging and the Abbey was bombed on the 15th. Berlin would first be bombed by American planes next month.[5]

The second certificate was issued in June, 1944. The Germans began their "robot" bomb attacks on England during this month; on the 4th Rome fell and

[5] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

the 6th was D-Day. The landing on Guam would not take place until next month, and the landing in Southern France and the liberation of Paris would not be accomplished until August. Okinawa was a year off.[5]

The third certificate was issued in September, 1944. This month saw the battles for Antwerp and Brussels and the landing on Palau. The Japanese surrender was still almost a year ahead.[5]

The fourth certificate was issued in November, 1944. The first landings on the Philippines had just been made the previous month, and it would not be until the following month that a landing would be made on Mindoro. The German counter-offensive and the Battle of the "Bulge" were still a month or more ahead; the landing on Iwo Jima was still three months ahead, and it would not fall for still another month.[5]

The thrust of the argument of the Court below is that the taxpayer and others to whom the Board had issued certificates of necessity limited in percentage, should have declined in the midst of the war to build or otherwise enlarge facilities necessary in the war effort, and should have engaged instead in litigation. The situation is vastly different from that presented in *Callanan Road Improvement Company* v. *United States,* 345 U.S. 507, relied on by the Court below, and more closely resembles those presented in *Union Pacific R.R. Co.* v. *Commission,* 248 U.S. 67, and *Swift, etc. Company* v. *United States,* 111 U.S. 22. For, the courses open to the taxpayer, and to those similarly situated, were to proceed with the facilities necessary to production for the war effort, or to engage in a

[5] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

veritable industrial sit-down, with all of the consequences that that might have entailed in view of the Government's war powers. See, *e.g.*, Act of Oct. 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, Tit. VI, Sec. 601, 602, 56 Stat. 181. That under the circumstances, the result of their having taken the former course[6] should, as the Court below says, be the forfeiture of their right to litigate the question at all would appear to be unconscionable. Particularly would this be so since, as we have seen, mandamus would have been inconclusive and wholly inadequate as a remedy. Further, if the record and the findings of the Tax Court be bare as to facts which would make clear this Hobson's choice, the fault lies elsewhere than with the taxpayer, for no question of waiver, estoppel or collateral attack was raised by the Commissioner in the Tax Court and the case was not tried to that issue. As this Court said in reversing a reversal of a decision of the Board of Tax Appeals in *General Utilities & Operating Co.* v. *Helvering, supra,* 296 U.S. at 206:

> The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board * * *. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised.

And, again in *Helvering* v. *Rankin, supra,* 295 U.S. 123, 131, 132:

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[6] It is perhaps significant that *Graphite*, although relating to a certificate issued in 1944, did not arise until 1947, well after the war was over. Presumably, the facilities involved had been acquired by then.

> If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board * * *. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.

CONCLUSION

The Court of Appeals for the Second Circuit has made an erroneously restrictive interpretation of the rights of taxpayers under Section 124 of the Internal Revenue Code of 1939, in conflict with decisions of the Court of Claims. It has also erroneously interpreted its role upon petitions to review decisions of the Tax Court, and has applied an erroneous principle which "would render orderly administrative procedure impossible". The problems are important ones affecting a large number of currently pending cases. The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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